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FLEXIBILITY IN A “REORGANIZED” AND “SIMPLIFIED” TREATY

JO SHAW*

1. Introduction: simplification and flexibility

This paper contemplates some key aspects of the fate of flexibility in a “simplified” and “reorganized” new constitutional Treaty (NCT) for the European Union. It is assumed throughout this paper that the Convention will, when reporting, recommend the adoption of such a Treaty and that it will provide one single coherent text, with perhaps some variations for final resolution by the Member States within an intergovernmental conference. Furthermore, it has been further assumed that this proposed text will, in more or less the same form, be accepted by the IGC mandated for 2004, but which may already begin its work in 2003. The paper has similarly presumed that the Preliminary Draft Constitutional Treaty (“PDCT”) presented by the Praesidium in October 2002¹ determined at an early stage of the debate the basic shape of the NCT. Specifically, it should comprise a “Part One” concerned with “constitutional structure”, a Part Two concerned with individual policies and certain institutional specifics, and a “Part Three” setting out the final provisions.² It may or may not contain an additional part or annex for the Charter of Fundamental Rights, and it might probably be accompanied by annexed Protocols and perhaps Organic Laws covering quasi-constitutional topics. Simplification was supposed to be one of the *leitmotifs* of the enterprise to produce such a text for the European Union, just as flexibility was undoubtedly one of the *leitmotifs* of the 1996–97 IGC which led to the Treaty of Amsterdam.

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1. CONV 369/02, 28 Oct. 2002.

2. For an analysis see Shaw, “Notes on the Praesidium’s Preliminary Draft Constitutional Treaty (CONV 369/02, 28 October 2002)”, Federal Trust Online Constitutional Paper, www.fedtrust.co.uk/eu_constitution.

Giuliano Amato will quickly become famous for pioneering the “not just” that “nothing is more complicated than simplification”, and then ensuring its inclusion in the final report of the Working Group on Simplification (of procedures and instruments) which he chaired at the Convention on the Future of the Union.³ This is the part of the Laeken mandate about which, as De Witte recently put it, everyone can apparently agree, whatever their overall political vision for Europe.⁴ Yet there are bound to be moments when the objective of simplification comes into quite stark conflict with political reality, and indeed when the beguiling simplicities of creating a single straightforward document for citizen consumption actually raise more legal problems than they solve. Furthermore, there may be thought to be an inherent paradox in bringing together flexibility and simplification, since the former could be said, by definition, to introduce complexity into the European Union’s legal order by facilitating, for example, separate regimes for different groups of Member States or opt-outs for States which lay claim to exceptionalism. What resonates better, perhaps, with a project aiming at simplification is uniformity rather than flexibility. This was precisely the point raised by the Legal Adviser to the Council, Piris, in his submission to the Working Group on Simplification, when he explicitly linked success in simplification of instruments to other sorts of simplification involving flexibility. He suggested that “the phenomenon of ‘opt-outs’ has created a variable geometry whose complexity is sometimes impenetrable.”⁵

“Flexibility” in EU law is of course an enormous topic stretching well beyond the compass of a single short paper. It has wider constitutional resonance, as well as practical implications in relation to the proliferation of multiple overlapping legal orders and complex questions of jurisdiction, scope and effects. This paper is limited to discussion of questions which arise in relation to whether the *following aspects of flexibility* should, or should not, be included in the NCT and in particular in Part One of the Treaty, and if so, under what conditions:

(i) Should the *enhanced cooperation provisions*⁶ included in the EC and EU treaties by the Treaty of Amsterdam and as amended by the Treaty of Nice be included in the NCT, and in particular in Part One, and if so under what conditions? The arguments made in this paper are based on the Nice *acquis*, although it was not in force at the time when many of the documents com-

3. CONV 424/02, WG IX 13, 29 Nov. 2002.

4. De Witte, “Simplification and Reorganization of the European Treaties”, 39 CML Rev., 000–000.

5. Piris, “Simplification of legislative procedures and instruments”, Working Group IX, Working Document 06, 6 Nov. 2002, 23.

6. For these purposes, the terms “enhanced”, “closer” and “reinforced” cooperation are treated as synonymous, connoting the specific provisions introduced by the Treaty of Amsterdam and amended by the Treaty of Nice.

mented upon here were drawn up.⁷ The principal features of these provisions are that they are enabling clauses enshrined in the treaties allowing groups of Member States under certain substantive and procedural conditions to borrow the EU institutional system to achieve objectives and to undertake tasks defined by the Treaties which could not be achieved or undertaken by applying the normal institutional rules governing that particular objective/task. These provisions extend to all three existing “pillars” in different ways and under different conditions, with the most limited arrangements applying to Common Foreign and Security Policy, with the exclusion of “matters having military or defence implications” (Art. 27c TEU, as amended by the Treaty of Nice). The post-Nice second pillar also retains the enhanced cooperation-esque possibility of constructive abstention (Art. 23(1) TEU).

(ii) What *types of opt-out or derogation arrangements* should survive under the new constitutional regime, and in particular should these be guaranteed or referenced in the NCT? Principal amongst such arrangements at present are the arrangements for EMU under the EC Treaty and for matters relating to the implementation of Article 14 EC /Title IV of Part Three of the EC Treaty/ Title VI of the TEU (Police and Judicial Cooperation in Criminal Matters), which are dealt with by a range of Protocols on the Schengen Acquis and on the positions of the UK, Ireland and Denmark. Although borrowing the language of “closer cooperation” from the Treaty of Amsterdam, these latter Protocol-based arrangements are more akin to the short-lived opt-out accorded to the United Kingdom in relation to social policy by the Treaty of Maastricht under the Protocol and Agreement on Social Policy (applicable between 1993 and 1997), in that they unconditionally accord a blanket authorization to the cooperating Member States to borrow the institutional framework of the EU. In addition, they protect the non-participants from the effects of EC/EU law in different ways depending upon the nature of the opt-out and make various provisions for opting-in which operate differently to the opt-in provisions of the enhanced cooperation clauses. These arrangements operate in addition to the enabling clauses applicable under the EC Treaty and TEU authorizing future instances of enhanced cooperation on an ad hoc basis within the field of justice and home affairs, whether under Title IV of Part Three of the EC Treaty, or under Title VI of the TEU, but the Schengen arrangements are protected from intrusion from the general enhanced cooperation provisions by Article 43(j) TEU. EMU’s flexibility presently finds its position in the detailed arrangements of Title VII of Part Three of the EC Treaty.

(iii) Should the NCT, and in particular Part One of the Treaty, (a) permit

7. See generally on the Treaty of Nice amendments Shaw, “Enhancing Cooperation after Nice: will the Treaty do the Trick?”, in Andenas and Usher (Eds.), *The Treaty of Nice* (Oxford, Hart, 2003, forthcoming).

implicitly or (b) refer explicitly to the possibility of Member States of the EU concluding amongst themselves and outside the institutional framework of the EU *international agreements*, even in respect of matters falling within the general scope of the EC/EU objectives in relation to integration? Article 306 EC on the Benelux (an explicit case of variable geometry) and Article 34(2)(d) TEU on the use of conventions to achieve Third Pillar policy objectives (which must – by virtue of the UK/Ireland opt-outs for Schengen – be capable of application by a limited number of Member States) are both cases of the explicit recognition of international law instruments giving rise to (potential) extra-Treaty flexibility via “*old fashioned*” means.⁸ Beyond the scope of these provisions, there is plenty of evidence of Member States concluding what De Witte terms “partial” agreements, “concluded between only *some* Member States of the European Union (with or without the participation of third States)” as well as “parallel” agreements, which are those “concluded between *all* the States that are members of the European Union at the time of the signature of the agreements”. These latter agreements may also involve the participation of third States. Article 293 EC, which institutionalizes parallel agreements by allowing the conclusion of conventions between the Member States in certain named areas of cooperation (e.g. mutual recognition and enforcement of judgments), was in fact always interpreted in practice as requiring the participation of *all* Member States. Parallel agreements involve, as De Witte puts it, not territorial differentiation, but *instrumental differentiation*.⁹ Both partial and parallel agreements could, in principle, challenge various aspects of the EC/EU legal order, such as inter-institutional balance or the obligations of Member States under the Treaties.

At this point it is worth quoting the cautionary words of “Kortenbergh” on the intersection between enhanced cooperation provisions and the usage of international agreements:

“If [the solution of closer cooperation in the Treaty of Amsterdam] had not been found, there was a serious risk of further instances of co-operation along the Schengen model, outside the framework of the Community treaties; and, if these examples of co-operation became numerous, there was a risk that a schism would progressively emerge in the Community, with competition from instances of intergovernmental co-operation developing outside the common institutional framework.”¹⁰

8. De Witte, “Old-fashioned flexibility: International agreements between Member States of the European Union”, in de Búrca and Scott (Eds.), *Constitutional Change in the EU* (Oxford, Hart, 2000), at p. 31 et seq.

9. De Witte, “Chameleonic Member States: Differentiation by means of partial and parallel international agreements”, in De Witte, Hanf and Vos (Eds.), *The Many Faces of Differentiation in EU Law* (Antwerp, Intersentia, 2001), at pp. 232–233.

10. Kortenbergh, “Closer cooperation in the Treaty of Amsterdam”, 35 CML Rev., 833 at 835.

This is the “safety-valve” rationale for the enhanced cooperation provisions, and of course it may well be true – the commentator, although unidentified, was known to be close to the IGC and should therefore be regarded as well-informed. On the other hand, the Member States did show themselves at Amsterdam to be more disposed to use the halfway house of Schengen-type arrangements involving incorporation into the Union legal order in order to create a pre-defined set of legal and institutional arrangements, rather than to leave matters purely to the possible *ad hoc* and very restricted application of the as yet unused enhanced cooperation provisions. In other words, the introduction of the enhanced cooperation provisions does not provide conclusive evidence that these are intended to be, or could conceivably become, the primary focus of flexible arrangements in the EU. However, the point has also been repeated by Galloway in relation to the “improved”, “eased” conditions relating to the use of enhanced cooperation, introduced by the Treaty of Nice, on the grounds that the new framework is “a deterrent to states seeking solutions or constituting a ‘core’ group outside the Union’s institutional future.” Galloway, like Kortenbergh, was close to the relevant IGC.¹¹ While the precise issue about whether enhanced cooperation protects or endangers EU cohesion may be contested, one clear message does come across, namely that the issue of determining the level of flexibility built into the new constitutional system will not be a merely technical question, but will be one with profound resonance within the normative framework of the EU.

The concentration upon the three topics cited above neglects many issues which fall under the general rubric of flexibility. On the one hand, it is not possible here to make any real contribution to sorting through the tortured vocabulary of flexibility, or to addressing wider governance or policy-related issues about so-called flexible instruments such as the open method of coordination. Likewise, although what is discussed in this paper is undoubtedly closely related to choices about the scope of competences which might be attributed to the “new” European Union after the Convention and after the IGC 2003/2004, the question of the possible survival of the so-called flexibility clause – Article 308 EC – falls outside the scope of the argument. Finally, the paper does not address one particular problem to which Piris drew attention in his submission to the Working Group on Simplification, namely the impact upon the EU legal order where the Court of Justice is given variable powers across different policy areas or in the context of different modes of governance. Where the powers of the Court are more limited in one field than in another, it is impossible to adopt an act on a double legal basis. This results in a “splitting” – i.e. splitting the single proposal for an act into two parts (institutional jargon).

11. Galloway, *The Treaty of Nice and Beyond* (Sheffield Academic Press, 2001), at p. 140.

The detailed presentation about questions of inclusion/exclusion, location, content and drafting in this paper (Sections 4–8) is set against some background about the idea of flexibility in the European Union (Section 2) and an outline articulation of the treatment of flexibility, especially enhanced cooperation, in documents which have come from or come before the Convention thus far (Section 3). Section 9 presents a number of conclusions.

2. Background to the discussion of flexibility

Viewed as a general political principle, we find contestation rather than consensus shaping the use of the term “flexibility”. This ranges from outright hostility to the very idea of non-uniformity, at one end of the spectrum, to the enthusiastic embracing of the utility of flexible arrangements within a transnational and multilevel governance system, at the other. It can be argued that flexibility *ought* to be regarded as a constitutional shaping principle of the EU, co-existing in comfortable synergy with the general principles of democratic constitutionalism which can be said to underlie the general system of the treaties, especially Article 6 TEU.¹² According to Yataganas,¹³ closer cooperation could even be considered a materialization of the constitutional tolerance principle enunciated by Weiler.¹⁴ These types of normative position sit especially comfortably with the proposition that any constitution is to be seen as an evolving project rather than as the perfect and generally immutable rendering of a fixed moment involving the exercise of political will by a popular sovereign. That proposition in turn finds strong support in both normative theories of constitutions as dialogic and relational sets of practices,¹⁵ and in the rich constitutional practices of flexibility within many, if not indeed most, States. It underpins the theory of dialogic or relational constitutionalism which implicitly shapes this paper, and it is a view of principle rather than pragmatism.

A very different thesis is articulated by Toth when he argues that “as a means of ensuring the future progress of the Union, no amount of opt-out, opt-in,

12. Shaw, “Relating Constitutionalism and Flexibility in the European Union”, in de Búrca and Scott, op. cit. *supra* note 8.

13. Yataganas, “The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union – A Continental Perspective”, *The Jean Monnet Chair Working Papers* 01/01 at p. 49 (www.jeanmonnetprogram.org).

14. Weiler, “Federalism without Constitutionalism: Europe’s *Sonderweg*”, in Nicolaïdis and Howse, *The Federal Vision* (OUP, Oxford, 2001).

15. See esp. the work of the Canadian political theorist James Tully: *Strange Multiplicity. Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995); id. “The unfreedom of the moderns in comparison to their ideals of Constitutional Democracy”, 65 *MLR* (2002), 204.

derogation and flexibility can provide a credible alternative” to the reforms which he advocates, namely strengthening the current constitutional elements of the Treaties in particular by altering the procedure for Treaty amendment (i.e. ironically by making the whole system more flexible).¹⁶ This type of argument thrives upon the generally implicit rider that EU constitutionalism is actually and immutably constitutionalism *for* integration, and is based upon a rather monocular perspective of the EU as the supplier of more integration, frequently in conjunction with the supply of more (hard) law.¹⁷

Turning the lens outwards, enlargement is an important background context to the flexibility debate, although it is often more an implicit frame than an explicit reference point. Bermann views the provisions on enhanced cooperation – however skilfully drafted to protect the interests of both the “ins” and the “outs” – as missing the real challenge of managing diversity, and adapting the deliberative process in view of enlargement:¹⁸

“[This] lies in finding legislative solutions at the Community level that entail the political participation of all Member States and that bind all Member States, even while permitting differential solutions or otherwise responding to the diversity of circumstances and needs among the . . . Member States.”

It is worth recalling that all these differences in approach do reflect real contestations visible within more general political discourse, where politicians as diverse as Joschka Fischer,¹⁹ William Hague²⁰ and Jacques Chirac²¹ all manage to use the language of flexibility or variable geometry as the basis for engaging in debates about the future of the European Union. Wallace evocatively describes flexibility as a “new principle and a new tool for responding to differences in the enthusiasms and capabilities of the member states of

16. Toth, “The legal effects of the protocols relating to the United Kingdom, Ireland and Denmark”, in Heukels, Blokker and Brus (Eds.), *The European Union after Amsterdam* (The Hague, Kluwer Law International, 1998).

17. See in particular Hallstein, *Europe in the Making* (London, Allen & Unwin, 1972), Chapt. Two, “Law in place of force”, who described the EEC as a creation of the law, as a source of law and as a legal system.

18. Bermann, “Law in an enlarged European Union”, 14 *European Union Studies Association Review* (2001), 1.

19. Joschka Fischer’s speech to the Humboldt University, Berlin, 12 May 2000.

20. William Hague’s speech as Leader to the UK Conservative Party Conference, October 5 2000, reported in House of Commons Research Paper 00/83, *IGC 2000: from Feira to Biarritz*, 27 Oct. 2000, at p. 23; see also his comments on UK Prime Minister Tony Blair’s statement on the Feira European Council, 21 June 2000, reported in House of Commons Research Paper 00/88, *IGC 2000: Enhanced Cooperation*, 21 Nov. 2000, at p. 24.

21. Jacques Chirac’s address to the German *Bundestag*, 27 June 2000.

the EU to take on new tasks of policy integration",²² but one could extend beyond the rubric of "enthusiasms and capabilities" to the realm of ideological differences about the nature of European integration.²³ As Warleigh comments, a "more normative issue" is hard to imagine, "since flexibility calls into question issues of solidarity, legitimacy and polity-building".²⁴

Interestingly, flexibility seems to share many commonalities with that other rather plastic concept, subsidiarity. Like subsidiarity, it can be made to mean most things to most people, depending upon the way in which it is understood and those aspects which are given most emphasis. Substantively, it offers a mechanism for choosing the appropriate frame of reference for political and legal arrangements. As Warleigh argues, it is a *normative* principle of governance.²⁵ The debate on flexibility is consequently associated, in much EU policy discourse, with the reform of the so-called "Community method" as a set of governance instruments,²⁶ although perhaps surprisingly the topic of enhanced cooperation and that form of flexibility in policy-making received little direct coverage in the Commission's White Paper on Governance of July 2001.²⁷ In that context, it seems to be a way of satisfying the various expectations and needs of both the Member States and the EU institutions thereby balancing various "public" interests, as well as other "private" stakeholders such as citizens, businesses and organizations. These expectations arise at a number of different levels, including the supranational, the national and the subnational. Overall, it is a way of balancing the dynamism of the very process of "integration" against the diffusion effects which are bound to stem from the success of an integration project which involves already a much larger number of participants than in its original conception of the "Six". In

22. H. Wallace, "Flexibility: A tool of integration or a restraint on disintegration?", in Neunreither and Wiener (Eds.), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* (OUP, 2000) at p. 173.

23. See, for this type of discussion, Hall, *How flexible should Europe be?*, Centre for European Reform Working Paper, London, 2000. Dewatripont et al., *Flexible Integration: Towards a More Effective and Democratic Europe* (London, CEPR, 1995) provides a slightly older review of positions on the desirability of flexibility, as does de la Serre and Wallace, *Flexibility and Enhanced Cooperation in the European Union: Placebo rather than panacea?*, Notre Europe Research and Policy Paper, No. 2, September 1997.

24. Warleigh, "After Nice: Making flexibility work", Paper to the UACES Research Conference, University of Bristol, 3–5 Sept. 2001.

25. Warleigh, *Flexible Integration. Which model for the European Union* (London, Continuum, 2002).

26. Interestingly enough, in a Contribution to the Convention on the "Community Method", Commissioners Barnier and Vitorino assert that "the Community method can coexist happily with other flexible forms of action", including enhanced cooperation: CONV 231/02, CONTRIB 80, 3 Sept. 2002, para. 2.2.

27. COM(2001)428 of 25 July 2001. See Scharpf, "European governance: Common concerns vs. the challenge of diversity", Jean Monnet Working Papers 07/01, Symposium on Responses to the Governance White Paper, at p. 11 (www.jeanmonnetprogram.org).

other words, while allowing diversity it avoids splintering and prevents the integration process becoming the hostage of the slowest or most reluctant Member States. One interesting and perhaps relevant innovation of the Treaty of Nice amendments is, however, the rewriting of Article 43 TEU to ensure that any enhanced cooperation is:

“(a) aimed at furthering the objectives of the Union and of the Community, at protecting and serving their interests and at reinforcing their *process of integration*...” (emphasis added).

Following Article 191 EC on European political parties, this is only the second use of the term “integration” anywhere in the Treaty edifice of the EU and the EC.

Likewise, subsidiarity can be seen simultaneously as meaning both “more” and “less”, as well as both a stronger and weaker “Europe”, depending upon whether it is given the “sovereignty” or the “federalism” “spin”. It has been used by different political actors to buy off both the German *Länder* and the strongly Euro-sceptic wing of the British Conservative party, even though the two groups have markedly different perceptions of the interests which need to be protected. The crucial point, then, is that the EU has yet to nominate in any clear way which *model* of flexibility it is following, and this has been reflected in the ways in which flexibility has been built – in a relatively ad hoc way – into the system of the EU Treaties.

3. Flexibility and the Convention

By the beginning of 2003, there had been very little explicit discussion of flexibility within the Convention, except in the limited context of the discussions of the Working Groups VII and VIII on External Action and Defence, and in the plenary meeting which considered their reports.²⁸ It was not introduced as a general topic at plenary and no working group was charged with addressing directly the concerns and tensions articulated perhaps most famously by the Lamers/Schäuble memorandum²⁹ and expressed in the previous section. One can only speculate as to why this is so. The analysis is therefore limited to the following categories of texts:

– The preliminary draft (or “PDCT”, see *supra*) which explicitly deals with

28. See Final Report of Working Group VII on External Action, CONV 459/02, WG VII 17, 16 Dec. 2002; Final Report of Working Group VIII on Defence, CONV 461/02, WG VIII 22, 16 Dec. 2002; Summary Report on the Plenary Session, Brussels, 20 Dec. 2002, CONV 473/02, 23 Dec. 2002.

29. Lamers and Schäuble memorandum: www.cdu.de/politik-a-z/dokumentationen/europa_braucht_verfassungsvertrag.htm.

the inclusion of enhanced cooperation in the NCT;³⁰

- The Commission's official and unofficial contributions to the Convention;
- The positions taken by euro-parties and party caucuses;
- Constitutional texts produced by, or on behalf of, Convention members, or by non-members who have sought to associate their work very closely with that of the Convention;³¹
- The work of the Working Groups on External Action and Defence.

As the Convention moved into its "endgame phase" at the beginning of 2003, it became common for commentators to remark that the "big dogs" had yet to bark. That is to say that while there had already been some notable official inputs from the Member States, alone or in alliance (France/Germany; the Benelux), no specific constitutional texts had been forthcoming from that key group of actors. Even the "UK draft", sponsored by Peter Hain the UK Government representative so far as it was issued as Convention Document, was in fact an academic text, prepared by a group working out of the University of Cambridge, for which the UK Government did not take responsibility.³² This situation has a tendency to give these reflections on flexibility a somewhat provisional feel, notwithstanding the relative importance and influence which must be attached to the PDCT as the basis for future deliberations in the Convention. This document was prepared by the Secretariat at the behest of Convention President Giscard d'Estaing, and it was adopted by the Praesidium for presentation to the Convention Plenary in late October 2002.

The Note on Simplification of the Treaties and the drawing up of a Constitutional Treaty, published by the Secretariat in September 2002,³³ worked on the assumption – which did not receive further articulation in that document – that the provisions on closer cooperation will ultimately be included in the NCT. In view of that, it was hardly surprising that the PDCT contained a provision on enhanced cooperation, under the heading of "Implementation of Union Action" in Article 32, in Title V of Part One of the Treaty on "Constitutional Structure". This (at present skeleton) provision

"should establish:

- the conditions for undertaking *enhanced cooperation* within the framework of the Treaty;
- if necessary, areas of the Treaty excluded from enhanced cooperation;
- the principle of applying the relevant provisions of the Treaty in adopting the acts necessary for implementing enhanced cooperation;

30. Cited *supra* note 1.

31. For a compilation of constitutional texts, see www.fedtrust.co.uk/eu_constitution and follow links to Study Group and Background Material.

32. CONV 345/1/02, REV 1, CONTRIB 122, 16 Oct. 2002.

33. CONV 250/02, 10 Sept. 2002.

- the obligations of states participating in enhanced cooperation, and of those not so participating” (emphasis in the original).

Provision is made for Protocols to be annexed to the Treaty, which could incorporate the existing Schengen arrangements, for example. No reference is made to the derogation arrangements in the area of monetary union, or to the position of international agreements between the Member States.

Comparisons with the proposals – both institutionally endorsed and of a more unofficial character – which have so far emerged from the Commission highlight the range of approaches which could be adopted in relation to this question, in contrast with the assumptions built into the PDCT.³⁴ In its initial Communication to the Convention entitled “A Project for the European Union”,³⁵ the Commission appeared clearly hostile to all manner of “flexibility” in the Union system. It suggested that it was time to review “the justification for derogations”:

“Managing a wide range of objectives and capacities without weakening the institutions will in this connection be one of the major challenges for the enlarged Union. The provisions of the treaties concerning reinforced cooperation offer answers which are largely theoretical, no doubt valid for one-off actions not linked with the Union’s main policy thrusts and which might justify adjustments to the common institutional framework, but inappropriate for keeping in step with an increasing amount of differentiation between Member States.

In operational terms, certain derogations are sources of real complexity for the action taken by most of the Member States, because of the interdependence between the countries of the Union. Examples are the exceptions which affect policies linked to the freedom of movement of people and which make cooperation with certain non-Community countries easier than with some of the Member States.

These considerations make a compelling case for a critical reappraisal of these derogations. The Convention should confirm that an à la carte Europe is not the right option for the future development of the Union. When the time comes to prepare a constitutional treaty, political attention should focus on the implications of joining the Union, by comparison with other formulas, such as those used within the European Economic Area (EEA).” (emphasis in the original)

34. A second of frame of reference for comparison is comprised by the previous work of the European Parliament in this area. This is usefully summarized in a document setting out the Parliament’s positions on the PDCT, by reference to earlier resolutions and reports: PE 314.676. Here the main focus is on the insufficiency of the EP’s role in authorizing enhanced cooperation.

35. COM(2002)247 of 22 May 2002, published in Sept. 2002 as a Convention document: CONV 229/02.

The genetic inheritance of this Communication clearly includes the White Paper on Governance,³⁶ with its celebration of the Community method and of *communautaire* orthodoxies.³⁷ On the other hand, in the later Communication on the Institutional Architecture, published in late 2002,³⁸ there was no discussion of flexibility or of derogations, a change of emphasis which is rather telling. That shift notwithstanding, the rather controversial Feasibility Study (codename: Penelope) drawn up within the Commission at the behest of Commission President Prodi and Commissioners Barnier and Vitorino, but not officially endorsed by the College of Commissioners, explicitly picks up the challenge of a critical reappraisal of the derogations enjoyed by certain Member States and does deal directly with flexibility questions.³⁹ It proposes a different structure for the EU's new constitutional framework which would not include the enhanced cooperation arrangements, but would include an explicit power on the part of Member States to conclude arrangements amongst themselves, but without borrowing the institutions and procedures of the Union. This is the "old-fashioned" approach sketched in Section 1 above, a "Benelux-type" arrangement: "The Member States may establish closer cooperation between themselves insofar as the objectives of such cooperation cannot be attained under the Constitution" (Art. 5(2) Feasibility Study Constitution).

The Study suggests dispensing with the enhanced cooperation arrangements from the constitutional framework for the following reasons:

- it proposes the abandonment of the unanimity requirement for constitutional amendments, suggesting instead an approval process involving a five-sixths majority in the European Council and ratification by five-sixths of the Member States before entry into force (or three quarters in respect of revisions of the sections of the Constitution relating to policies) (Art. 101);
- qualified majority voting would be extended to general use;
- within the framework of the single Constitution and the five Additional Acts appended to the Constitution which the Feasibility Study suggests, sufficient attention has been paid to the three current cases of variable geometry. The euro would be dealt with in a similar manner to the present one, in specific policy provisions; Schengen would be covered by Additional Act 4, which allows the continuation of the Schengen related protocols and specifically exempts the UK and Ireland from the coverage of provisions related to common external borders; defence would be covered by Additional Act 1 which

36. Cited *supra* note 27.

37. Although, compare the conclusions of Commissioners Barnier and Vitorino on the Community method and flexibility: see *supra* note 26.

38. *For the European Union. Peace, Freedom, Solidarity* COM(2002)728 of 4 Dec. 2002.

39. Contribution to a Preliminary Draft Constitution of the European Union, Working Document, 4 Dec. 2002.

would apply only to those Member States which subscribed to an obligation of mutual assistance in the event of an attack.

This leaves no space for the type of detailed provisions on enhanced cooperation currently contained in the EC Treaty and the Treaty on European Union.

In the texts of the European political parties, which have been working actively through party caucuses in the Convention,⁴⁰ flexibility receives a wide variety of treatment. An unofficial *Green Draft Constitution* of September 2002 makes no reference to enhanced cooperation. The *PES position paper* contains a simple statement without amplification or justification that the enhanced cooperation provisions should be retained, but it contains no discussion of opt-outs and derogations such as those for EMU or Schengen.⁴¹

Mixed messages emerge from the documents of the European People's Party. For example, the *EPP Congress Document: A Constitution for a Strong Europe* makes general reference to the value of unity in diversity, but contains no specific discussion or mention of the enhanced cooperation provisions or other cases of flexibility.⁴² However, like the PES document, this is a general position statement and not a set of draft proposals. More details can be found in a draft sponsored by Elmar Brok, the Chair of the EPP delegation to the Convention, which remains an unofficial document, although it has been discussed on several occasions by the delegation (most recently in Frascati in November 2002, consequently, this draft is referred to as the Frascati Draft).⁴³ This attempts to map the ideas produced in an earlier September draft onto the framework provided by the PDCT, in an endeavour to ensure that the Convention produces as its final output a workable constitutional text based on the *acquis communautaire* as well as the work of the Convention itself and the inputs it has received from outside. Articles 98–100 present the preconditions for enhanced cooperation (somewhat slimmed down compared to Nice), rules on decision-making and financing, and the principles of openness and consistency of activities.

A handful of other constitutional texts have been produced by or sponsored by Convention members, or produced by significant outside interests. Again, these reveal no consensus on the treatment of enhanced cooperation and flexibility generally. The draft model constitution for a Federal Union of Europe prepared by Andrew Duff, MEP, the ELDR (European Liberal Democrat

40. See Day and Shaw, "The evolution of Europe's transnational political parties in the era of European citizenship", in Cichowski and Börzel (Eds.), *State of the European Union Volume 6 (2003): Law, Politics and Society* (OUP, 2003).

41. Contribution from the PES Members of the Convention "Priorities for Europe", CONV 392/02, CONTRIB 137, 8 Nov. 2002, p. 3.

42. Document adopted by the EPP Congress in Estoril, Portugal, 18 Oct. 2002; available at www.eppe.org/archive/Constitution_EN_1992.asp.

43. Contribution by Elmar Brok, Member of the Convention, "The Constitution of the European Union", CONV 325/1/02, REV 1, CONTRIB 111, 6 Dec. 2002.

and Reform) group chair in the Convention, makes no mention of enhanced cooperation, or indeed flexibility.⁴⁴

All the other examples do however engage with enhanced cooperation. The most cursory treatment appears in the draft sponsored by the European Policy Centre (EPC) and the *Institut Royal des Relations Internationales* in Belgium, and prepared by a number of Belgian academics.⁴⁵ This document provides for a minimal solution with a simple enabling clause, which forms the last clause in Section 1 (Powers of the Union) of Title II (Missions of the European Union). No provision is made for Schengen or euro-based derogations in the draft. The UK's "Dashwood draft"⁴⁶ treats enhanced cooperation as a separate Part Three of the Constitutional Treaty, after Part One (the "constitutional" elements: nature of the Union, citizenship, limits of powers, etc.) and Part Two (institutions). Part Three would comprise Title VII of the TEU, "as amended" (amendments not specified). Perhaps a little oddly, given its quite extensive treatment of the fate of different parts of the EC Treaty and the TEU in the event of reorganization, the draft does not discuss the fate of the various Schengen related protocols. Other drafts proceed similarly, including the Italian draft sponsored by the MEP Elena Paciotti draft,⁴⁷ the draft prepared by Robert Badinter, French Senator and alternate member of the Convention,⁴⁸ and so-called Frieburg Draft of European Constitution.⁴⁹ Each of these drafts leans heavily on the existing Treaty *acquis*. By way of contrast, a draft prepared by Jo Leinen, a PES MEP who has a long-standing interest in both federal and constitutional matters and who participated in the Fundamental Rights Convention, although he was not selected in the European Parliament delegation for the Constitutional Convention, approaches the matter a little differently. Enhanced cooperation is classed as an "instrument" of the EU. It appears under Article 70 alongside the Union's laws, regulations, decisions and the coordination of the policies of the Member States. Further details are

44. CONV 234/02, CONTRIB 82, 3 Sept. 2002. See further Contribution by Andrew Duff, member of the Convention "The preliminary draft constitutional treaty (CONV 369/02): a comment", CONV 465/02, CONTRIB 175, 16 Dec. 2002, in which he comments on Art. 32 that he has "yet to be persuaded that we need to retain the general provisions for 'enhanced cooperation' in anything like their present form. Instead the possibility of an associate membership of the Union could be considered. . .", p. 4.

45. Issued originally on 17 Sept. 17 2002, and subsequently amended and re-issued in October 2002. The provision on enhanced cooperation is identical. See www.theepc.be, follow links to *Challenge Europe* Journal.

46. See *supra* note 32.

47. CONV 335/02, CONTRIB 117, 19 Nov. 2002; text prepared by the European Observatory of the Fondazione Basso.

48. CONV 317/02, CONTRIB 105, 30 Sept. 2002; selections were also published in *Le Monde* on 26 Sept. 2002.

49. Available on the Federal Trust website: see *supra* note 31.

provided under Article 76 in the same title, which details also the features of the other instruments.⁵⁰

The primary conclusion to be drawn from this survey of the more general texts is that there is considerable variety in the approaches taken. From that very variety some provisional conclusions can be drawn. Specifically, uncertainty about where enhanced cooperation “belongs” doubtless reflects the continued uncertainty about what it is actually for.

This leaves the deliberations of the Working Groups on External Action (WG VII) and Defence (VIII), where the possibilities of enhanced cooperation and the need for flexibility in certain fields of external relations have been raised. This is unsurprising, given that despite the self-evident need for flexibility in the external policy domain, progress towards institutionalizing enhanced cooperation under what is presently Pillar Two of the EU has been slower than in relation to the other two pillars. The draft final report of WG VII contained a rather inconclusive reference to outcomes in relation to flexibility, constructive abstention and enhanced cooperation,⁵¹ even though the discussion of the matter was trailed in more inviting terms by documents outlining the mandate and agenda of the working group.⁵² The document simply referred to some members of the group wanting to see greater use of constructive abstention and the possible extension of enhanced cooperation to all areas of CFSP, including defence. The final report approached the matter similarly, suggesting the need for “some form of flexibility” in decision-making, perhaps through constructive abstention.⁵³ The plenary discussion came to the same, limited, conclusion.⁵⁴ Meanwhile WG VIII on defence also had references to “opting-in”, constructive abstention and cooperation between limited groups of Member States in its mandate.⁵⁵ The agenda for the meeting of this working group on 4 November 2002 focused particularly on flexibility and enhanced cooperation⁵⁶ and in the summary of that meeting comments were made about the discussion having enabled the working group to reach agreement on the need for greater flexibility in the field of defence,

50. Document available on www.europa-web.de/europa/03euinf/08VERFAS/leinendr.htm, dated 24 Oct. 2002; see “Jo Leinen proposes a Federal EU Constitution”, *EU Observer* 25 Oct. 2002.

51. Working Group VII, Working Document 21 Rev 2, 29 Nov. 2002.

52. CONV 206/02 of July 19 2002, mandate for the second wave of working groups issued by the Secretariat; CONV 252/02, 10 Sept. 2002, more elaborated version of the mandate introduced by the Chair, Jean-Luc Dehaene; CONV 356/02, 15 Oct. 2002: members invited by the chair to reflect on possible extensions of enhanced cooperation and constructive abstention.

53. CONV 459/02, p. 7, *supra* note 28.

54. CONV 437/02, p. 5, *supra* note 28.

55. CONV 246/02, 10 Sept. 2002.

56. CONV 379/02.

based on the voluntary commitments of Member States.⁵⁷ The draft final report envisages a specific enhanced cooperation mechanism in the defence field, for Member States to opt in on the basis of both willingness and capability, a mechanism drawing its inspiration from the Treaty of Maastricht arrangements for the euro.⁵⁸ Although the final report was unable to indicate unanimity in this matter, it referred once again to the need for constructive abstention rules to apply, to the desirability for a form of closer cooperation mechanism allowing Member States wanting to go further and faster in the defence field to do so (a “defence Euro-zone”), and to the need to amend the Nice Treaty provisions to remove the exclusion of defence from the scope of enhanced cooperation.⁵⁹ It was clear that there was no consensus to support taking these recommendations forward when the plenary debated the final report in December 2002.⁶⁰ The difficulties in finding common ground on the contentious question of flexibility on the occasion of its first appearance in plenary debate provided an important warning about the challenges involved in finding an acceptable solution for the new Constitutional Treaty.

4. In or out – the “constitutional” question

The first decision to be made is whether any of the three forms of flexibility outlined in the first section of the paper should be included anywhere in the NCT, and in particular in Part One. That is not to suggest that they should necessarily disappear altogether – the proposition that simplification by definition requires the abandonment of all of these arrangements for flexibility has not been defended by many influential voices – but whether they should be reflected in the NCT, and whether it is appropriate for the NCT to deal with issues such as the enabling of enhanced cooperation or the provision of derogations. In other words, the focus here should be on whether a document of a constitutional type *ought to reflect* the possibilities for flexibility within the system, or whether it should concentrate on broad lines of unity, uniformity and general principle, within which exceptional derogations have no part. It is worth recalling that for more than thirty years the Treaty system did largely ignore the question of flexibility, with the exception of Article 233 EEC/ Article 306 EC on the Benelux, Article 227 EEC/ Article 299 EC on territorial applicability of the treaties, and Article 95(4)-(7) EC on derogation possibilities in relation to internal market legislation adopted by a qualified majority (only after the Single European Act of 1986).

57. CONV 405/02, WG VIII 16, 14 Nov. 2002.

58. WG VIII, WD 22 Rev 1, 6 Dec. 2002.

59. CONV 461/02, pp. 18–19, *supra* note 28.

60. CONV 437/02, p. 11, *supra* note 28.

It is not a priori apparent why a constitutional-type document which is intended to present the bare bones of the polity and the institutional system, plus provide an indication of the policy areas and activities of the Union, should explicitly make reference to or provision for derogations, whether of the primary type (e.g. Schengen) or of the secondary, enabling type (e.g. enhanced cooperation). This may be why the provisions are not included in the model treaty for a Federal Union prepared by Duff⁶¹ – but in any event that more limited document contained nothing which paralleled the more detailed “part two” provisions suggested in the PDCT. In any event, Duff is known to be hostile to the enhanced cooperation arrangements.⁶² It certainly explains the treatment of derogations, opt-outs and enhanced cooperation in the Prodi-sponsored Feasibility Study.⁶³ These issues, it could be argued, are not matters of constitutional principle, as such, but rather belong in a second policy-oriented part of the treaties or whatever legal-constitutional edifice of the EU, attached to the specific fields where they might arise. This is a rather different question (about the formal content of a constitutional document) to that asking what the underlying constitutional relationship between constitutionalism and flexibility might be.⁶⁴ On the other hand, it might be useful if the formal constitutional structure in some way reflected an underlying consensus about the principles upon which the constitution was based.

In any event, from the perspective of the EU treaties as “constitutionalized” by the Court of Justice, wherever flexible solutions are used within the legal framework of the EU, the same legal principles must apply. As De Witte correctly states in relation to the use of international agreements by the Member States, the key questions are the application of the Member States’ duty of loyal cooperation (Art. 10 EC), the possible pre-emption of the Member States’ treaty-making competence by reference to the existence of EU legal acts in the same field, the principle of the supremacy of EU law, and possible conflicts with the principle of subsidiarity.⁶⁵ In addition, it could be argued that the provisions on enhanced cooperation – whether or not included in the first part of a NCT or merely confined to individual policy sector provisions in a second part of or annex to the NCT – would themselves have the effect of excluding the use of non-Treaty based international cooperation between Member States. They could be said to provide an *exclusive* regime for groups of Member States to promote closer integration in fields falling within the

61. *Supra* note 44.

62. CONV 465/02, *supra* note 44.

63. See *supra* note 40.

64. Shaw, *op. cit.* *supra* note 12.

65. De Witte, *op. cit.* *supra* note 8 at 41–55.

scope of EU law.⁶⁶ These points about the general effects of EU law and the specific effects of the enhanced cooperation provisions would apply regardless of whether reference is made in the NCT to forms of flexibility, since they are part of a constitutional *acquis* constructed by the Court of Justice that it is probably safe to assume will survive the transition from the present constitutional *acquis* to the new dispensation provided by a constitutional treaty. To conclude otherwise would be to assume that the Member States will resolve entirely to unpick the edifice of the EU legal order and start afresh.

5. Other questions relating to inclusion and exclusion

The “constitutional” question is, however, only one of a series of questions driven by both principle and pragmatism which would influence the decision to include one or more of the three aspects of flexibility isolated for discussion in this paper. Since different arguments arise with respect to these three categories, they will each be dealt with separately.

5.1. *Enhanced cooperation*

The question posed by contributions to the debate such as those of the Commission (May Communication) and the Feasibility Study is whether enhanced cooperation should disappear altogether from the treaty structure. One ground for removal could be that it has yet to be used and is indeed never that likely to be used given the restrictiveness of the conditions, so what point is there to retaining it anywhere in the Treaty framework – whether the first or the second part of the NCT? Treaty provisions should reflect reality not hypothetical scenarios. In favour of retention in the Treaty structure overall speaks the argument that considerable effort on the part of officials at the national and EU levels has gone into the drafting of the provisions – during successive IGCs of 1996–97 and 2000 – and that such endeavours are not and should not be fundamentally purposeless.⁶⁷ Use of the provisions has at least been

66. This is an argument made by Constantinesco, but not shared by de Witte: *supra* note 8 at 55; the reference is to V. Constantinesco, “Les clauses de ‘coopération renforcée’. Le protocole sur l’application des principes de subsidiarité et proportionnalité”, (1997) RTDE, 751, at 755.

67. On the drafting of the respective treaties see de Schoutheete, “Closer cooperation: Political background and issues in the negotiation”, in Monar and Wessels (Eds.), *The European Union after the Treaty of Amsterdam* (London, Continuum, 2001); Stubb, “Negotiating flexible integration in the Amsterdam Treaty”, in Neunreither and Wiener, *supra* note 22; Gray and Stubb, “Keynote article: The Treaty of Nice – Negotiating a poisoned chalice”, (2001) 39 JCMS, Annual Review 2000/2001, 5; Stubb, *Negotiating flexibility in the EU: Amsterdam, Nice and beyond* (Basingstoke, Palgrave/Macmillan, 2002).

mooted, or perhaps better threatened, most plausibly in relation to Italy's initial reluctance to come into line over the Arrest Warrant measure. Consequently the provisions can be seen in the context of a set of bargaining and trade-off scenarios, principally centring around the relationships between the Member States.

5.2. *Opt-out/derogation arrangements*

It would amount to a major political decision to remove the derogation arrangements for EMU and Schengen from the EU legal/political order on the occasion of the conclusion of the anticipated NCT, and such a decision is highly unlikely to be taken. It is probably unworkable at present with EMU because to do so could have the effect of challenging the basis of what has been achieved in Euroland in terms of the creation of a single currency. Reference in the constitutional structure part of the NCT (i.e. Part One), given there is no equivalent reference at present in either the EC Treaty or the Treaty on European Union, seems an unnecessary complication, and it would be best to stick with the status quo of a system for derogation and variable geometry built into the detailed provisions. On the other hand, if the decision is taken to enumerate forms of competence by reference to categories such as "exclusive" and "shared" in Part One, whether in relation to internal or external competences, then it may be necessary to enter a rider to the effect that competence in relation to the euro is only exclusive for those Member States which have currently subscribed to the currency.⁶⁸ Turning to Schengen, it needs to be recognized that for a variety of reasons, the UK, Ireland and Denmark would not relinquish their derogations easily. However, the inclusion of the derogations in the Part One of the NCT itself seems unnecessary; it should suffice to provide for those derogations (as is already in effect the case for EMU) either in Part Two, or to retain a set of protocols, as is the case for Schengen, etc. The only question is whether this is fundamentally dishonest: would it mislead the ordinary citizen reading about the constitutional structure of the European Union if no mention were made of the existence of these provisions?

5.3. *International agreements between Member States of the EU*

It is, of course, possible that the NCT could explicitly *prohibit* the conclusion of international agreements between the Member States (some or all of them)

68. In the Praesidium's draft of Articles 1 to 16 of the Constitutional Treaty (CONV 528/03, of 6 Feb. 2003) Art. 11(1) provides for exclusive competence of the Union in monetary policy for those States which have joined the euro.

outside the institutional framework of the EU. Such a prohibition could only apply to agreements falling within the substantive scope of the EU's attributed powers – assuming the principle of attribution will be carried over to the era of the NCT. That is a very unlikely scenario. As De Witte and Wallace have both commented,⁶⁹ it is only relatively recently that the idea that the EU might represent an *all-encompassing* framework for organizing relations between European states has gained any currency. It remains a very contested idea. De Witte's finding that there is certainly no explosion in the use of either partial or parallel agreements, that the former in particular are indispensable in certain areas such as cross-border environmental cooperation, and that the Member States have demonstrated a trend towards preferring cooperation within rather than outside the framework of EU law all suggest that this is a phenomenon to be tolerated, constitutionally speaking.⁷⁰ Practically speaking, he finds them basically "innocuous". In practice, it seems very unlikely that any reference to the specific cases of partial or parallel agreements such as the Benelux will find their way into Part One of the NCT, although they could conceivably appear in Part Two, in the final provisions, or in an annex/protocol. Furthermore, there is no compelling reason to include a general provision in the Constitutional Treaty empowering the Member States to use international law in appropriate cases, despite the support lent to this approach by the Prodi-sponsored Feasibility Study.⁷¹ The general legal principles of EU law – assuming that they continue to exist – combined with the centripetal forces associated with the increasing dominance of the EU and its institutional framework over "political and legal processes of Europeanization"⁷² – represent the right sort of low key legal framework for dealing with what is likely to be an ongoing phenomenon (i.e. the use of international law by the Member States), but not a destructive one from the point of view of the integrity of the EU legal order.

6. Conclusions in relation to inclusion

The rest of the paper proceeds on the basis that enhanced cooperation in particular will be included in the NCT. It reflects a general principle of flexibility which the EU should embrace rather than reject – although it might help, of course, if some degree of common understanding about what it means could

69. De Witte, *supra* note 9 at 235; Wallace, *supra* note 22 at p. 176.

70. De Witte, *supra* note 9 at 266, with reference also to Shaw, *supra* note 12.

71. See *supra* note 39.

72. A quote from von Bogdandy, "The European Union as a supranational federation: A conceptual attempt in the light of the Amsterdam Treaty", 6 *Columbia Journal of European Law* (2000) 27 at 32, cited in de Witte *supra* note 9 at 267.

evolve within the EU's governance institutions, as well as within the Member States. Some might say that this general principle is sufficiently reflected in references to (national) diversity in the general parts of the PDCT, but it is arguable that the text should go further. The fragmentation risk associated by some with the Amsterdam innovations has not materialized; on the contrary despite the paucity of use, even in relation to *plausible threats* to make use of enhanced cooperation as part of a wider bargaining process, the provisions are more likely to be cohesive than destructive of the *acquis communautaire*. The provisions on enhanced cooperation are accordingly made the primary focus of attention in the rest of the paper. The opt-outs are also likely to remain an element of EU law, but they reflect case-by-case (political) contingencies rather than general principles of constitutional order. Consequently, their place is in a second part of the Treaty – as would be obvious assuming the existing arrangements for Economic and Monetary Union were carried on for the future, and as would likewise seem sensible in relation to the various opt-outs for the UK, Ireland and Denmark (as well as associated opt-in arrangements) in relation to Justice and Home Affairs matters. However, the interaction – if any – between these derogation arrangements and the enhanced cooperation provisions might be a matter for Part One of the NCT, especially if it were to contain some codifications of the underlying federal-like constitutional principles which the Court of Justice has elaborated in relation to the EC Treaty in particular (e.g. explicit recognition of the primacy of EU law).⁷³ Likewise, it seems implausible that flexibility in the form of international agreements between the Member States will cease and there are no compelling reasons of constitutional principle to suggest that it should, but again it probably does not need be recognized as such in the NCT. The general application of the underlying principles of EU law which would govern the relationship between such measures and the general edifice of EU law should suffice.

This is of course in some respects a bizarre conclusion, involving the exclusion of that which is actually used by way of flexibility mechanisms from Part One, at least, of the future NCT and the inclusion of that which is not used. Considerations of constitutional aesthetics and constitutional respectability could be used to drive the argument here, and these seem to speak in favour of focusing the constitutional question on enhanced cooperation as both a facilitator of flexible arrangements in the future and an expression of the general principle of flexibility.

73. Art. 9(1) of the first draft of Articles 1 to 16 of the Constitutional Treaty (CONV 528/03, cited *supra* note 68) provides for the supremacy of EU law.

7. Questions raised by inclusion

If enhanced cooperation is to be included in Part One of the NCT, then the following questions arise which will be considered in the ensuing paragraphs in more detail:

Where should it appear in Part One – on its own in a separate Title or Section, or in conjunction with other provisions? If so, which ones?

Should the provisions be basically the same as the Nice *acquis* or should further amendments be introduced above and beyond what would be strictly necessary to fit the provisions to the changed legal scenario of new legal edifice for the European Union (whatever the entity is called) based on a single legal personality for the EU?

Should Part One contain a simple single statement of the principle of enhanced cooperation, or should more elaborated provisions be included? If the former, how should it be formulated?

If more elaborated provisions are included in Part One, what elements might be included and what might be confined to the second part of the Treaties?

7.1. Location of the enhanced cooperation provisions in the NCT

It is clear from the documents reviewed in Section 3 above that there is no consensus about where enhanced cooperation should appear in any putative NCT. This betrays, of course, disagreement about what enhanced cooperation actually *is*. Is enhanced cooperation merely an *instrument* for achieving the wider objectives of the EU, or does it reflect an underlying constitutional *principle* of flexibility which itself is embedded into the objectives of the Union? How should it be located in relation to principles which express the balance of convergence/integration vs. diversity/disintegration in the Union, such as the rules on the allocation of competences, or the obligations of the Member States in relation to the Union?

The main possibilities are the following:

a) Preamble/principles/missions: this approach could be said to be supported by the fact that the present Article 11 EC, containing the principles for the use of enhanced cooperation under the EC Treaty, is located amongst “principles” in Part One of that Treaty, right after the Member States’ obligation of loyal cooperation (Art. 10 EC).

b) Competences/missions: the draft prepared for the EPC inserts enhanced cooperation – as a bare principle – amongst a list it describes as the “powers of the Union”, but which actually contains most of the basic principles of competence attribution (limited powers, types of competences, subsidiarity,

proportionality, loyal cooperation and an Art. 308-type legal basis).⁷⁴

c) Activities/policies: this is the solution adopted in the PDCT,⁷⁵ insofar as enhanced cooperation appears after an outline listing of the key principles for implementation of Union action, including the instruments of the Union, legislative procedures, procedures for the adoption of decisions, implementing measures and supporting actions, plus specifications for CFSP, defence policy and policy on police matters and crime. This is in Title V of Part One. That means that it is separated from the principles governing Union competences and actions (Title III). This must be regarded as the most likely option for the NCT as things stand at present.

d) Instruments: the Leinen draft adopts the approach of treating enhanced cooperation as an instrument of the EU.⁷⁶ This is similar to the PDCT approach.

e) Separate chapter, title or part: this option is chosen by quite a number of influential drafts prepared by academics or similar, such as the Frascati draft for the Euro-conservatives,⁷⁷ the Hain/Dashwood draft,⁷⁸ the Paciotti draft,⁷⁹ the Badinter draft,⁸⁰ and the Freiburg draft.⁸¹ This approach can be supported by reference to the fact that in the present TEU, the general principles of enhanced cooperation appear as a separate Title VII, just before the general and final provisions, and was consequently adopted by the EUI Basic Treaty Project of 2000 which proceeded *à droit constant*.⁸² On the other hand, the disadvantage of including enhanced cooperation in a separate title, especially if it were included on its own in Part One as a bare principle leaving other conditions to be set out in Part Two, would be that it might appear that enhanced cooperation is itself a separate and free-standing means of achieving Union objectives, independent of the specific policy activities which the Union is mandated to engage in with a view to achieving its objectives. In fact, that would also appear to be the impression given by the drafting approach in the Leinen draft.

74. See *supra* note 45.

75. See *supra* note 1. However, an enhanced cooperation provision did not appear in the first draft of the provisions on instruments issued by the Praesidium: see Draft of Articles 24 to 33 of the Constitutional Treaty (CONV 571/03, of 26 Feb. 2003).

76. *Supra* note 50.

77. *Supra* note 43.

78. *Supra* note 46.

79. *Supra* note 47.

80. *Supra* note 48.

81. *Supra* note 49.

82. Robert Schumann Centre for Advanced Studies (European University Institute, Florence), *A Basic Treaty for the European Union. A Study of the Reorganization of the Treaties* (coordinated by Mény and Ehlermann), May 2000 (see europa.eu.int/comm/archives/igc2000/ofdoc/discussiondocs).

f) *Final provisions*: none of the published drafts locate enhanced cooperation amongst the final provisions.

The general premise with which this paper works is the following: if enhanced cooperation is to be included in the Basic Treaty, then it needs to be fully anchored or mainstreamed into the groundwork of the Union, not treated as an outlier. In that sense, the solution suggested by the PDCT seems a preferable solution for the NCT rather than preserving the *status quo* of treating enhanced cooperation as a separate subject, presumed not to be capable of assimilation to other topics covered by the Treaty. Of course, the solution is not all or nothing: it would be possible to adopt a variety of combinations. For example, a) + e), a) + c) and c) + e) are all possible combinations which could effect the desired objective of “integrating” enhanced cooperation.

7.2. *Same provisions or changed?*

The enhanced cooperation *status quo* comprises the provisions as introduced by the Treaty of Amsterdam, and as subsequently amended by the Treaty of Nice. Although the Treaty of Amsterdam “constitutionalized” a notion of closer cooperation, by introducing the formalized possibility for the future development of flexible integration under the Treaties, subject to certain conditions, its provisions were not given a wholehearted welcome, even by those who felt that this was fundamentally an appropriate response to the types of fissures in relation to the very nature of the integration project which had been appearing since the early 1990s amongst the Member States.⁸³ Criticisms focused *inter alia* on the absence of a secure *concept* which could locate flexibility, as a general principle, as well as closer cooperation as a treaty-based system, in relation to other values which should be underpinned by processes of constitutionalization such as legitimacy. It was also generally observed that the provisions as they stood could not conceivably be applied, without violating the conditions enshrined in the Treaty. Evaluations of the amendments introduced by the Treaty of Nice⁸⁴ have generally been a great deal more positive. Philippart’s upbeat conclusion is worth citing in full:

83. For commentary see Shaw, “The Treaty of Amsterdam: Challenges of flexibility and legitimacy”, 4 ELJ (1998), 63; Weatherill, “‘If I Had Wanted You to Understand I Would Have Explained It Better’: What is the purpose of the provisions on closer co-operation introduced by the Treaty of Amsterdam”, in O’Keeffe and Twomey (Eds.), *Legal Issues of the Amsterdam Treaty* (Oxford: Hart, 1999); Kortenberg, *supra* note 10; Philippart and Edwards, “The provisions on closer cooperation in the Treaty of Amsterdam: The politics of flexibility in the European Union”, 37 JCMS (1999), 670.

84. E.g. Shaw, *op.cit.* *supra* note 7; Warleigh, *supra* notes 24 and 25; Philippart, “The new provisions on ‘Closer Cooperation’: A call for prudent politics”, 14 *European Community Studies Association Review* (2001), 6; Gray and Stubb, *supra* note 67 at 17; Yataganas, *supra* note 13; Bradley, “Institutional design in the Treaty of Nice”, 38 CML Rev., 1095.

“All in all, with the Treaty of Nice, the EU is now equipped with a reasonably operational mechanism for closer cooperation. Indeed, preliminary attempts to make use of closer cooperation have shown that many preconditions are less restrictive than expected. The services of the Council and the Commission have, for instance, adopted a rather liberal interpretation of the ‘last resort’ or the protection of the *acquis*. For a number of important areas such as the environment, justice and home affairs, taxation and other flanking measures of monetary policy, closer cooperation can now function as a ‘laboratory’ for the EU. The willing can ‘experiment’ with new policies and regimes which could eventually be of interest for the entire Union. The others can wait for the first result, before deciding to join the experiment or not. It offers the possibility to establish ‘large sub-systemic’ closer cooperation – i.e. by focusing on a topic interesting only to a sub-group of member states.”

The Commission’s suggestion that the provisions are still basically unworkable and largely hypothetical is clearly not shared by all observers, although my own view is that while the amendments have clarified and simplified some of the most problematic and dysfunctional aspects of the original Amsterdam provisions on closer cooperation, it remains difficult to provide a precise interpretation of what the future significance and effects of post-Nice enhanced cooperation might be and in particular whether these provisions are any more likely to be applied in practice than the dormant provisions they have succeeded.⁸⁵ Furthermore, having largely removed the “emergency brake”, fixed the number of participating states to eight, reworded, eased and reorganized the conditions associated with what enhanced cooperation is for (promoting integration, etc.) and when it can happen, and hedged the provisions around with reiterations of the language of “last resort”, openness to all, encouragement to participate, etc. the Member States at the 2000 IGC must have felt that they had produced a set of provisions intended to balance the ongoing divergent pressures of diversity and unity. There are few significant innovations in relation to the wording of the enhanced cooperation provisions forthcoming from the texts surveyed in Section 3, although the Frascati draft attempts a simplification.⁸⁶ Perhaps, therefore, the biggest unanswered question concerns whether or not there will be formally excluded areas (as opposed to conditions restricting the application in practice of enhanced cooperation), as there are at present with the exclusion of matters with military and defence implications, under Article 27b TEU. Some evidence can be derived from the discussions of the defence issue in Working Group VIII and subsequently at the Plenary to indicate that this exclusion might possibly disappear as part of a more comprehensive, if likewise variegated, settlement on defence issues,

85. See Shaw, *supra* note 82 for more details.

86. See *supra* note 43.

although that is by no means clear.⁸⁷ The exclusion inserted at Nice was more about a failure to agree in the context of heated negotiations, rather than connoting a fundamental choice to exclude – paradoxically – the flexibility of an enhanced cooperation approach from a field of policy-making where flexible solutions seem by definition to be the most appropriate.

It is arguable that one of the most controversial aspects of the Nice *acquis* on enhanced cooperation is the setting of the participation requirement at just eight Member States. This may represent a majority at present, but in the future it will not. Eventually it will represent under a third of the Member States. The Nice default of eight Member States is picked up by the majority of drafts, especially those like the Hain/Dashwood draft which consciously seek continuity with the *acquis*. Leinen refers only to a “group” of Member States, with no specific number attached. Badinter’s draft, however, returns to the Amsterdam position of a majority of Member States (Art. 72), but then the conditions in that draft are drawn up more with an eye to the Treaty of Amsterdam than to the Treaty of Nice.⁸⁸ The choice to follow the reduced number of Member States accepted at Nice may respect the recently expressed will of those states, but on the other hand it could be said to reduce the constitutional respectability of enhanced cooperation, especially in a possible scenario where a more extended use of qualified majority voting is accepted. This doubtless lies behind the Prodi Feasibility Study rejection of enhanced cooperation altogether, and the suggestion that a Benelux-type clause provides cooperating Member States with all the flexibility they need, in international law and outside the framework of the EU institutions.⁸⁹

7.3. *A single statement of principle*

Should the reference to enhanced cooperation in the NCT comprise a simple statement of the principle in Part One that this is a possible approach to policy-making, leaving the rest to be elaborated in the more detailed Part Two or in appropriate annexes? The EPC draft takes the most simple approach, pronouncing that “Member States may establish closer cooperation between themselves and make use of the institutions, procedures and mechanisms of the Constitution, provided that this closer cooperation meets the conditions laid down by the annexed Treaty” (Art. 24).⁹⁰ The consequence of this approach to drafting is that either there will need to be some common provisions in the “annexed Treaty” referred to (i.e. the PDCT’s Part Two), or

87. See *supra* the text at note 52 et seq.

88. *Supra* note 48.

89. See *supra* note 39.

90. See *supra* note 45

there will need to be repetition in relation the different instances of enhanced cooperation relating to the various domains presently covered by the three pillars in that same Part of the Treaty. This is partly because it would be naïve to imagine that the “de-pillarization” of the European Union which the PDCT suggests might happen will magically result in exactly the same institutional regime, not to say basic procedural and substantive conditions, applying to enhanced cooperation across the “old” three pillars. In other words, there are likely to remain special rules for enhanced cooperation in the area of foreign, security and defence policy, and possibly also in relation to cooperation between the Member States on police and criminal matters. The more elegant solution would be to have as many common provisions as possible, whether in Part One or Part Two. The other disadvantage is of the minimalist approach is that it provides no clue at all as to what enhanced cooperation is actually for or about, and this seems inappropriate from the perspective of clarity for the citizen, once the decision has been taken to include the provisions in the Treaty. At least sufficient detail must surely be provided to explain to the citizen about what this concept actually means. This is the assumption on which this paper therefore proceeds, and it appears to be shared by the PDCT.

8. A more elaborated set of provisions

Article 32 of the PDCT contains a skeleton provision on enhanced cooperation. Once fleshed out, it would cover the following:

- the conditions for undertaking *enhanced cooperation* within the framework of the Treaty;
- if necessary, areas of the Treaty excluded from enhanced cooperation;
- the principle of applying the relevant provisions of the Treaty in adopting the acts necessary for implementing enhanced cooperation;
- the obligations of States participating in enhanced cooperation, and of those not so participating.

This approach can be taken as the starting point for analysis, although it is clear that it could be improved upon in certain areas.

8.1. A definitional clause

What concept of “conditions” is being employed in Article 32? Does it replicate the approach taken in the current TEU Title VII? In fact, Article 43(a) TEU – although nominally a “condition” of the use of enhanced cooperation – is as close as the current Treaty provisions come to a general definition of the nature and purpose of enhanced cooperation, insofar as it refers to the furtherance of the objectives of the Union and the Community, the necessity

that enhanced cooperation must be aimed at promoting the interests of the Union and the Community, and at reinforcing their process of integration. These general definitional “conditions”, which would be unlikely in themselves to be justiciable conditions, could also be combined with the reference to “respect” for *acquis communautaire* in Article 43(c) TEU, with the references in Article 43b TEU to the need to encourage as many States as possible to participate and the reference in Article 43a TEU to the use of enhanced cooperation only as a last resort, and with the rather vague obligation placed by Article 45 TEU on the Council and Commission to ensure the consistency of activities undertaken on the basis of enhanced cooperation; together these set out the general foundational principles of enhanced cooperation, and could be a second core provision on enhanced cooperation suitable for Part One of the new treaty, following on from the basic empowerment or enabling clause stating that Member States *may* engage in enhanced cooperation. The only difficulty might be complexity. For example, should such a provision engage with the different set of purposes for any enhanced cooperation in the field of CFSP set out in Article 27a TEU, consistent with the specific objectives of the Union in that field? Thus it refers to enhanced cooperation aiming “at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the international scene” Likewise, in the area of Police and Judicial Cooperation in relation to criminal matters, enhanced cooperation must have the “aim of enabling the Union to develop more rapidly as an area of freedom, security and justice. . .” (Art. 40(1) TEU). However, these are ultimately provisions ensuring that enhanced cooperation remains within the objectives of the Union, and that can be dealt with through a general clause. Enabling and definitional clauses constitute together the bare minimum that would need to be included in Part One of the NCT to ensure sufficient citizen clarity, whilst maintaining simplicity. Other common clauses could be included in Part Two, along with any specificities relating to foreign, security and defence policy, and policy on the police and crime, should these prove necessary.

8.2. *A conditions clause*

According to the current TEU provisions (Art. 43(b), (d)-(j)), enhanced cooperation activities must

- respect the Treaties and the single institutional framework of the Union;
- remain within the limits of the powers conferred by the Treaties on the Community and the Union and not fall within the exclusive competence of the Community;
- not undermine the internal market or economic and social cohesion;
- not constitute a barrier to or discrimination in trade between the Member

State and not distort competition between them;

- involve a minimum of eight Member States;
- respect the competences, rights and obligations of the non-participating Member States;
- not affect the provisions of the Protocol integrating the Schengen acquis into the framework of the European Union;⁹¹ and
- be open to all the Member States, a point repeated in Article 43b.

Given the inapplicability of many of these conditions in the area of CFSP, again there are different substantive conditions for enhanced cooperation in that field (Art. 27a TEU) requiring respect for:

- the principles, objectives, general guidelines and consistency of the common foreign and security policy and the decisions taken within the framework of that policy;
- the powers of the European Community; and
- consistency between all the Union's policies and its external activities.

Again, it may be difficult to envisage an effective combination of these provisions into something simple and comprehensible for the NCT, and yet it might be misleading to include the relevant provisions of Article 43 alone, given that effectively enhanced cooperation under Title V TEU is a more or less separate and self-contained regime, with only occasional references to Title VII.

8.3. *Exclusions clause*

The PDCT envisages that certain specific areas may be excluded from the ambit of enhanced cooperation. At present, the only exclusion contained in Title VII of the TEU laying down the general precepts governing enhanced cooperation concerns the areas which fall within the exclusive competence of the Community (Art. 43(d) TEU). The exclusion of matters with military and defence implications is presently in Title V of the TEU, but this may no longer be required depending upon the deliberations of the Convention.⁹²

8.4. *An institutional arrangements clause*

The PCDT next assumes that the general institutional arrangements for enhanced cooperation will comprise the principle of the borrowing of the institutions, rules on voting and deliberation, etc. of the TEU and the EC

91. This comprises the only current reference to the links or relationship between enhanced cooperation under the Treaties and the other two forms of flexibility discussed in this paper.

92. See *supra* text at note 52 et seq.

Treaty, which is the approach presently deployed by Title VII of the TEU (Art. 44(1) TEU). In fact, in relation to CFSP, although borrowing occurs, it does so on the basis of a reference in Article 27a(2) to the applicability of the rest of the provisions – institutional and substantive – on CFSP. There seems no necessary basis for taking that different approach once the anticipated process of “merger” or “de-pillarization” has taken place. The main disadvantage of Article 44(1) TEU from the perspective of the NCT is that it is a somewhat detailed provision undertaking dry tasks such as defining what a qualified majority would be in the case of a reduced number of Member States, and it might therefore be thought unsuitable at least for Part One of the simplified reorganized Treaty. One area of concern which will need close attention is the question of European Parliamentary involvement in the triggering of enhanced cooperation arrangements, and whether the current Article 11(2) EC which protects the prerogatives of the Parliament in areas where legislation is normally conducted via the co-decision process goes far enough.⁹³

8.5. *A consequences clause*

Finally, the PDCT envisages dealing in Article 32 with the obligations of States participating in enhanced cooperation, and of those not so participating. These are presently dealt with in Article 44(2) TEU. It might be better to engage with this topic under a wider heading concerned with the consequences of enhanced cooperation and to encompass here also the principle of the exclusion of any acts adopted from the Union *acquis*, a provision presently located in a somewhat lonely position at the conclusion of Article 44(1) TEU.⁹⁴ The principle that non-participants should not impede the implementation of enhanced cooperation arrangements seems a useful one to include here. This heading might well also encompass budgetary arrangements, which are presently dealt with under Title VII of the TEU (Art. 44a) but which do not appear in the PCDT sketch.

8.6. *Triggering and implementation clauses*

The separate topic perhaps most likely to be excluded at least from Part One of the the NCT and included only in the putative Part Two of the Treaty

93. See *supra* note 34 and Report on the Treaty of Nice and the future of the European Union, Committee on Constitutional Affairs, Rapporteurs: Mendez de Vigo and Seguro, A5-0168/2001, 4 May 2001, approved by EP Resolution on 31 May 2001.

94. Case T-135/96, *UEAPME v. Council*, [1998] ECR II-2335 makes it clear that the boundaries of the *acquis* cannot so easily be sealed.

(or indeed in an annexed Protocol or organic law) concerns the triggering arrangements and implementation arrangements, which may well continue to vary from one policy area to another as they do at present.⁹⁵ These provisions all comprise the decision-making rules, the specific inter-institutional balance applicable in relation to the current three cases of enhanced cooperation, and the respective roles of the European Council, the Council, the Commission and the Parliament, as well as the High Representative in relation to enhanced cooperation in the field of CFSP. There seems unlikely to be an effective case made for reinstalling the emergency brake – although it would continue by default in relation to CFSP unless there were a departure from the decision-making principles contained in Article 23(2) TEU.

9. Conclusions

The paper concentrates only on whether a limited number of aspects of the overall “flexibility question” should be included in any new constitutional treaty likely to emerge from the combined Convention/IGC reform process. The discussion is limited to the enhanced cooperation provisions of the TEU and the EC Treaty, the existing types of opt-outs and derogations in favour of particular Member States, and the use by the Member States of international agreements outside the institutional framework of the EU. It leaves aside other wider questions about flexibility. As a general assumption, the paper accepts a positive synergy between the principles of flexibility and constitutionalism. Moreover, it views flexibility as a normative principle of governance. This means that resolving the where, what and how of flexibility in the NCT cannot ever be a merely technical question. On the contrary, it is a highly political question, in every sense.

Article 32 of the PDCT, although a skeleton provision, offers important and authoritative guidance about the “thinking” of the influential actors within the Convention on the question of whether to include enhanced cooperation, and if so in what form and to what extent. Other texts also provide (inconclusive) guidance on how the enhanced cooperation provisions in particular might find a home in any NCT, and stronger messages can be expected as and when the Member States decide to submit concrete constitutional suggestions to the Convention.

Enhanced cooperation should be and is likely to be included in the NCT, and indeed in Part One thereof, amongst the provisions on “constitutional structure”. It reflects a general principle of flexibility which the EU should embrace rather than reject. The fragmentation risk raised by some comment-

95. Cf. Art. 11 EC, Arts. 40–40b TEU, and Art. 27e TEU.

ators has not materialized; on the contrary despite the paucity of usage, even in relation to *plausible threats* to make use of enhanced cooperation as part of a wider bargaining process, the provisions are more likely to be cohesive than destructive of the *acquis communautaire*. The opt-outs are also likely to remain an element of EU law, but they reflect case-by-case (political) contingencies rather than general principles of constitutional order. Consequently, their place is in a second part of the Treaty or in protocols/organic laws. However, the interaction – if any – between these derogation arrangements and the enhanced cooperation provisions might be a matter for the NCT, especially if it were to contain some codifications of the underlying federal-like constitutional principles which the Court of Justice has elaborated in relation to the EC Treaty in particular (e.g. explicit recognition of the primacy of EU law). There are no compelling reasons of constitutional principle to suggest that cooperation between the Member States via the medium of international law should cease, but again this form of flexibility should probably not be recognized as such in the NCT, and especially not in Part One, except in relation to the underlying principles of EU law which would govern the relationship between such measures and the general edifice of EU law.

If enhanced cooperation is to be included in the NCT, then it needs to be fully mainstreamed within the Union system, and not treated as an outlier. In that sense, the solution suggested by the PDCT of incorporating enhanced cooperation into the activities, policies and instruments of the Union within Part One seems the best solution. This is better than preserving the *status quo* under the Treaty on European Union which involves treating enhanced cooperation as a separate subject, presumed not to be capable of assimilation to other topics covered by the Treaty. In relation to the contents of the provisions, the Nice *acquis* is taken as the starting point. One of the largest questions likely to be raised will concern whether or not the exclusion of matters with defence and military implications will continue once the Working Group on Defence in the Convention has concluded its work.

The presentation of enhanced cooperation in Part One of the NCT should not be limited to a single statement of principle or enabling clause. At least sufficient detail must be provided to explain to the citizen what this concept actually means. This is the approach apparently adopted in the PDCT, although it does not justify its approach. Although the skeleton provision of the PDCT provides a useful starting point for discussing what should be included in the NCT, the approach taken could be improved upon in some areas. It would be useful to see also included in Part One a general definitional clause about the nature and purpose of enhanced cooperation, based on Article 43(a) TEU, plus other references to the nature of enhanced cooperation such as its use as a last resort and the “openness” and consistency principles. Together these two

clauses (enabling and definitional) represent a bare minimum for the purposes of constitutional communication.

It might also be useful, if difficult, to envisage a summary of the more specific and in some cases potentially justiciable conditions applicable to enhanced cooperation. However, the differences in relation to CFSP and indeed PJC set up an obstacle to simplification and codification. Other provisions could perhaps be placed in Part Two, or even in separate instruments such as protocols. One of the most difficult to justify including is an equivalent to Article 44(1) TEU, as it is a somewhat dry and complex provision, unsuited to the vocation of the NCT to provide a simple and citizen-friendly evocation of the basic foundations of the EU. A set of provisions related to the consequences of enhanced cooperation should be gathered together, including the principle of exclusion of acts adopted from the Union *acquis*, budgetary arrangements and the rights, duties and obligations of states participating and not participating in enhanced cooperation. It seems appropriate to exclude – mirroring the current arrangements – the diverse triggering arrangements and precise inter-institutional relationships involved in different cases of enhanced cooperation from the NCT. These can be included in Part Two.